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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. 181

AARON ROTH, *Petitioner*

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION,
RETAIL CLERKS INTERNATIONAL PRO-
TECTIVE ASSOCIATION, THOMAS DAY
AND VERNON HOUSEWRIGHT,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE RESPONDENTS
IN OPPOSITION.

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STATEMENT OF MATTER INVOLVED.

This case involves a labor dispute within the terms of Chapter 12 of the Acts of 1933 of the Indiana General Assembly being Sections 40-501 to 40-514 inclusive, Burns Indiana Statutes, Annotated 1933, (Appendix A) which act is the prototype of the Federal Norris-LaGuardia Act passed in 1932. Respondent Union is an established labor Union, whose members are clerks employed in Retail Stores (R. 105 top).

Petitioner is a member of a grocers' association and owns and operates a retail grocery store and employs clerks eligible for membership in respondent union (R. 78 bottom). That at and for some time prior to the time of the patrolling complained of, petitioner's clerks were members in good standing, with all dues paid, in respondent union (R. 105, R. 77, and R. 91). That petitioner, on request of the grocers' association of which he was a member, refused to enter into a contract with respondent Union, which contract provided for hours of employment and wages and the further provision that the petitioner should agree that all future clerks employed by him should, if not members of respondent Union at time of employment, become and remain members of respondent Union as a condition of employment (R. 96). On May 17, 1939, the respondent Union requested the petitioner to sign the agreement which had been presented to him for signature, which he refused to do stating that he had given his word to the grocers' association that he would not do so (R. 104). Thereupon petitioners' clerks were asked to strike which they refused to do. A patrol was established which consisted of one person walking unaccompanied along the outer edge of the sidewalk in front of petitioner's retail store carrying a banner with the inscription thereon "THIS STORE IS UNFAIR TO RETAIL CLERKS UNION, LOCAL NO. 1460, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR" (R. 100). That the picketing was free from fraud, violence or any unlawful conduct (R. 100). On the afternoon of May 17, 1939, and after the picketing began petitioner without any request from, or knowledge of, either of his clerks caused to be prepared a written resignation of all of his clerks from respondent Union (Exhibit 2, R. 93), accompanied with the request that his clerks read the same and do as they

saw fit. That the first knowledge which petitioner's clerks or either of them had of the preparation of such resignation was when petitioner handed the same to one of his clerks to read (R. 79, R. 90-91). That immediately upon receiving said Exhibit 2, the clerks did read and sign the written resignation in petitioner's store (R. 87 and 88). After the same was signed it was mailed to the respondent Union and received by it the day after the picketing began.

After the typewritten resignation was mailed to the respondent Union, the petitioner filed this action in the Lake Circuit Court against respondents for an injunction seeking to enjoin respondents from in any manner picketing or causing to be picketed petitioner's said retail store. Petitioner contended that none of his employees were members of respondent Union, that he was at peace with them, that the object of the picketing was to induce petitioner to sign a closed shop contract with respondent Union and that such object was unlawful and that picketing for such purpose, even though peaceful and free from violence, was fraudulent.

The respondents contend that peaceful picketing or peaceful persuasion in relation to any dispute between petitioner, an employer, and respondent, a trade union, may be indulged in under the constitutional guarantee of freedom of speech even though his employees are in no controversy with him. Further, that all of petitioner's clerks were members of respondent Union at the time that the patrolling began. That the demand of the respondent Union, that all future clerks employed by petitioner should, as a condition of employment, become and remain members of respondent Union was a legal objective. Further, that the acts of petitioner in interfering and aiding and encouraging his employees to sever their connection with the respondent Union during the time the picketing was

being carried on precludes the petitioner under the statute from seeking or obtaining injunctive relief.

The trial court on the first hearing issued a conditional temporary injunction (R. 13) from which petitioner appealed to the Indiana Supreme Court which reversed the trial court, *Roth v. Local Union, etc.*, Dec. 22, 1939, 216 Ind. 363, 24 N. E. (2d) 28, (R. 18). The evidence was not brought up on the first appeal for review. (R. 41) Appendix B.

Upon retrial the trial court granted a permanent injunction (R. 29) enjoining respondents from in any manner picketing petitioner's store. Respondents appealed to the Supreme Court of Indiana, *Local Union, etc. v. Roth*, Feb. 24, 1941, 218 Ind. 275, 31 N. E. (2d) 986, Record 41, Appendix C, which court reversed the trial court with this language:

"On the trial of the application for a temporary injunction, the court found the facts specially. Upon the appeal the evidence was not brought before us, and the cause was decided upon the basis of the facts disclosed by the special findings. From the facts shown, it was concluded by this court that the three clerks who worked for Roth in his store were not members of the picketing union at the time the picketing began and at the time demands were made upon him to sign a closed-shop agreement; that he had not interfered with the freedom of his employees to join or not to join the union; that he was refusing to interfere or to sign a contract, by the terms of which he agreed to require his clerks to join the union upon the ground that to do so would require him to violate the expressed statutory public policy of the State (Acts 1933, Chapter 12, Section 2, page 28, Burns Indiana Statutes, 1933 Section 40-502, Baldwin's Ind. St. 1934, 10156) (R. 41-42).

"* * * Upon the present appeal the evidence is brought into the record * * * (R. 42)."

The court then sets out the testimony of the clerks employed by the petitioner showing the preparation and manner and way in which the resignation was prepared and signed. (R. 42, 43 and 44). The court continues:

"It is clear from this undisputed evidence that at the time the union demanded that Roth sign a closed shop contract, and at the time the picketing began, all of Roth's clerks were members of the picketing union, and continued to be members for at least several hours thereafter; that Dorothy Carlson, and, it may be inferred, the other two clerks, never saw the letter of resignation until it was handed to them by Roth; that she at least, and probably the other two, had not planned to resign until presented with the document * * * (R. 45). It clearly indicates that Roth's employees were not 'free from interference,' as the public policy statute upon which he relies requires that they should be." (R. 45) * * *

"These facts established a case differing substantially and materially from the one disclosed by the special findings. From the special findings it appears to be a case in which a labor union seeks, by picketing, to coerce an employer to require his employees who are not members of the union to join the union upon penalty of being discharged. But it is not such a case. At the time the picketing began its purpose was to coerce an employer, all of whose employees were members of the picketing union, to agree that in the future he would employ only union members. The right to an injunction under such circumstances was denied in *Scofes et al v. Helmar et al* (1933), 205 Ind. 596, 187 N. E. 662. (R. 45) * * * The employer had interfered and aided and encouraged his employees to sever their connection with the union. The conduct is a violation of the very public policy statute which the appellee relies upon as entitling him to an injunction. * * * Under the public policy declared by that statute, he has been unfair, and the banner carried by the picket speaks the truth." (R. 45 and 46.)

Upon retrial, the trial court again granted a permanent injunction enjoining respondents from in any manner picketing petitioner's store. (R. 53.) The respondents appealed to the Supreme Court of the State of Indiana (*Local No. 1460 etc. v. Roth*, March 5, 1942, ——— Ind. ———, 39 N. E. (2d) 775, (R. 117), Appendix D. The Supreme Court of Indiana again reversed the lower court with the following language:

"In the former opinion we commented upon the fact that none of the clerks knew about the letter until it was handed them ready for their signatures and that its source was a mystery. In the retrial appellee had the opportunity of producing evidence to rebut any erroneous inference we may have drawn from the facts and from his unexplained connection with the letter. But he did not choose to testify. Nor was his conduct in anywise explained. There is no change in the evidence as to what he did. (R. 118-119) * * * there is no escape from the conclusion that their employer interfered and aided and encouraged his employees to sever a connection with the union which he thought existed, and this at the time of the picketing which he sought to enjoin. We think the facts are substantially the same as related in the second opinion which therefore is the law of the case." (R. 119.)

The first question presented by the record and the petition and brief of the petitioner is: Will the Supreme Court of the United States issue a writ of certiorari to a State Supreme Court on a decision of that court which is based upon facts supported by the record?

Respondents respectfully submit that the findings, decision and opinion of the Indiana Supreme Court in the instant case is supported and sustained by all the evidence in the record and that no title, right, privilege or immunity are specially set up or claimed by the petitioner under the constitution which has not heretofore been passed upon and uniformly denied by this court.

JURISDICTION

Jurisdiction not shown.

This court has frequently announced the rule that the decision of a state court upon a question of fact will not be made the subject of inquiry and review except:

1. Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and,

2. Where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

United Gas Public Service Company v. State of Texas (1938) 303 U. S. 123, 58 S. Ct. 483.

Aetna Life Insurance Company v. Dunken (1924) 266 U. S. 389, 394; 45 S. Ct. 129.

Truax v. Corrigan (1921) 257 U. S. 312, 324, 325.

The petitioner in his petition and brief when read in conjunction with the record has raised no issue bringing him within either of the above exceptions:

1. (a) No federal right has been denied the petitioner. His claim being that he is deprived of his rights under the Fourteenth Amendment to the (1) Constitution of the United States by reason of the fact that none of his employees were members of the Union at the time the picketing began and (2) that the purpose of the picketing was to require petitioner to unionize his store. This court has answered this question adversely to petitioner's contention in the case of *American Federation of Labor et al v. Swing et*

al (Feb. 10, 1941) 312 U. S. 321, 61 S. Ct. 570, with the following language:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

Thornhill v. Alabama (1940) 310 U. S. 88-105; 60 S. Ct. 736, 746.

Senn v. Tile Layers Protective Unions, Local No. 3, (1937) 301 U. S. 468, 478; 57 S. Ct. 857, 862.

New Negro Alliance v. Sanitary Grocery, (1938) 303 U. S. 552, 58 S. Ct. 703.

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc. (1941) 61 S. Ct. 552; 312 U. S. 287.

Bakery Pastry Drivers and Helpers Local 802, etc. v. Wohl et al (1942) ————U. S.———; 62 S. Ct. 816.

Carlson v. People of State of California (1940) 310 U. S. 106.

(b) The finding of the Indiana Supreme Court that petitioner's employees were members of the respondent Union at the time that the picketing began and that the petitioner had interfered and aided and encouraged his employes to sever a connection with the Union, which he

thought existed at the time of the picketing which he sought to enjoin, is sustained and supported by the record.

Evidence: Wellington Barnes (R. 79-80).

Evidence: Dorothy Carlson (R. 87 and 90).

(c) In view of the decisions of the Supreme Court of the United States, the decision and judgment of the Indiana Supreme Court complained of by the petitioner does not deprive him of the equal protection of the laws of the State of Indiana and does not deprive him of any right, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States or the Constitution of the State of Indiana nor the laws of the State of Indiana as embodied in Section 40-501 to 40-514, Burns Indiana Statute 1933, Appendix A.

2. The petition, brief and record discloses no conclusion of law as to a federal right intermingled with the finding of facts.

THE QUESTIONS PRESENTED.

Respondent, a union of those engaged as retail clerks, unsuccessfully tried to unionize petitioner's retail grocery store. Peaceful picketing of the store followed. After a patrol was established, petitioner, without the knowledge, consent or request of his clerks, caused a typewritten letter of resignation from the union to be prepared, which he handed to them, while they were at work in his store. The clerks signed the same immediately after its receipt by them. To enjoin interference with his business and with the freedom of his workers not to rejoin the union and to prevent respondent Union from demanding a union contract, petitioner began the present suit.

The sole questions presented are:

1. Is the demand of respondent Union to require petitioner to unionize his store unlawful, in view of the public policy clause of Chapter 12 of the Acts of 1933 Burns Indiana Statutes Annotated, 1933?

2. Can the State of Indiana exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between petitioner (an employer) and the respondent (a union) so small as to contain only an employer and those directly employed by him?

3. Is petitioner entitled to injunctive relief, under the Act, when he is guilty of interfering, aiding and encouraging his employees to sever their connections with the respondent Union?

REASONS WHY THE WRIT SHOULD BE DENIED.

Each of the questions presented for review in this case have been passed upon by this court and decided adversely to petitioner's contention.

1. Practically every case presented to this court for review involving a labor dispute contained a demand for the unionization of the employer's plant or place of business, and this court has uniformly upheld such demand as lawful.

In the case of *Senn v. Tile Layers Protective Union*, (1937) *Local 105*, 301 U. S. 468, 57 S. Ct. 857, this court said:

On page 474: "The union endeavored to induce Senn to become a union contractor * * * Senn refused to sign the agreement and unionize his shop."

On page 478: "The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution." On page 480: "The end sought by the union is not unconstitutional * * *." On page 481: "The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action * * * There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisement * * *." On page 483: "One has no constitutional right to a remedy against the lawful conduct of another."

This court expressly upheld, and declared as lawful, the demand of a union that an employer unionize his store, in the case of *American Federation of Labor et al v. Swing et al*, 312 U. S. 321; 61 S. Ct. 568. The following cases are in point:

Bakery and Pastry Drivers etc. v. Wohl (1942)
 ——— U. S. ———, 62 S. Ct. 816, 820.

Thornhill v. Alabama (1940) 310 U. S. 88-105,
 60 S. Ct. 736, 746.

New Negro Alliance v. Sanitary Grocery (1938)
 303 U. S. 552, 58 S. Ct. 703.

The seventy-fourth Congress of the United States, Senate Bill No. 1958, has expressly legalized contracts between an employer and the Union, requiring as a condition of employment membership in the Union if such labor organization is the representative of a majority of the employer's employees, said act being known as the National Labor Relations Act, Section A, Subsection 3, reading as follows:

* * * "Provided, that nothing in this act, or in the National Industrial Recovery Act, (U. S. C. Sup. 7, Title 15, Section 201-712), as amended from time to time or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization not established, maintained or existed by any action defined in this act as an unfair labor practice to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9, (a) in the appropriate collective bargaining unit covered by such agreement when made." (Act of July 5, 1935, Ch. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 et seq.)

The Public Policy Clause of Chapter 12 of the Acts of 1933, Burns Indiana Statutes Annotated (See App. Index A) does not prohibit nor declare as unlawful such a demand.

2. This court has uniformly upheld the right of workmen to peacefully exercise the right of free communication by means of patrolling and advertising by means of

banners the facts involved in a labor dispute when the same is conducted free from violence, fraud or unlawful conduct, even though the relationship of employer and employee does not exist.

Speaking of the above right in labor disputes, in the case of *American Federation of Labor et al v. Swing et al*, Supra, this court said:

On page 323: "A union of those engaged in what the record described as beauty work, unsuccessfully tried to unionize Swing's Beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit * * *." On page 325: "All that we have before us, then, is an instance of peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravated danger. *Thornhill v. Alabama*, 310 U. S. 88, 105; 60 S. Ct. 736, 746; 84 L. Ed. 1093. We are asked to sustain a decree which, for purposes of this case, asserts as the common law of a State that there can be no peaceful picketing or peaceful persuasion in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech * * * The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State. A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him * * * The right of free communication can-

not therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ."

Other cases passed upon by this court in which the same question was decided in the same manner, are:

Bakery and Pastry Drivers, etc. v. Wohl (Supra).

Thornhill v. Alabama (1940) 310 U. S. 88, 105, 60 S. Ct. 736, 746.

Carlson v. People of State of California (1940) 310 U. S. 106; 60 S. Ct. 746, 748.

New Negro Alliance v. Sanitary Grocery Co. (1938) 303 U. S. 552; 58 S. Ct. 703.

American Steel Foundries v. Tri-City Central Trade Council (1937) 257 U. S. 184, 209; 42 S. Ct. 72, 78.

Senn v. Tile Layers Protective Union (1937), 301 U. S. 468, 478; 57 S. Ct. 857, 862.

Lauf v. E. G. Shinner & Co., (1938) 303 U. S. 323; 58 S. Ct. 578.

The Supreme Court of Indiana decided this same question in the same manner in the cases of *Scofes et al v. Helmar et al* (1933) 205 Ind. 596; 187 N. E. 662. *Local Union No. 26, etc., v. City of Kokomo* (1937) 211 Ind. 72; 5 N. E. (2d) 628.

CONCLUSION.

The petitioner has no constitutional right to a remedy against the lawful conduct of the respondents.

Senn v. Tile Layers Protective Union, Local No. 3 (1937) (Supra).

American Federation of Labor et al v. Swing et al (1941) (Supra).

Thornhill v. Alabama (Supra) and others.

The opinion and judgment of the Indiana Supreme Court, *Local Union, etc. v. Roth*, ——— Ind. ———, 39 N. E. (2d) 775, (Appendix D) violates no constitutional rights of the petitioner.

No federal questions, not heretofore decided adversely to petitioner's claims, are presented; there is no conflict in the decisions.

The petition should be denied.

Respectfully submitted,

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